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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. 734

BERNARD M. WOLFE, doing business under the names and styles "Dutch Paint Company" and "Manning-Mitchell Paint Company,"

Petitioner,

vs.

NATIONAL LEAD COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

BERNARD M. WOLFE,
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In Propria Persona.

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Petitioner files this Petition for Rehearing on his own behalf, asking a reconsideration of the denial by this Court of the Writ of Certiorari filed in this case

by petitioner's former attorneys. Petitioner submits that there are substantial grounds warranting the Writ of Certiorari which were not presented for consideration by this Court in the original Petition for Certiorari.

Petitioner prays that the Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Ninth Circuit entered on its Docket No. 16157 on November 27, 1959; and to review an interlocutory judgment of the United States Court of Appeals for the Ninth Circuit entered on its Docket No. 13737 on May 17, 1955. Petitioner further prays for a reconsideration by this Court of the denial of his petition to review the interlocutory judgment entered May 17, 1955 (October term, 1955, Wolfe et al., doing business as Dutch Paint Co., etc. v. National Lead Co., November 7, 1955, 350 U.S. 883).

QUESTIONS PRESENTED

1. Is the imposition of a quarter of a million dollar judgment, in a trademark action, where there is no evidence of loss by the party infringed, a violation of the Eighth Amendment to the Constitution of the United States (Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishment inflicted)?

2. Is it a violation of the Fifth Amendment to the Constitution of the United States (No person shall . . . be deprived of property without due process of law), to impose a quarter of a million dollar judg-

ment in a trademark action where there is no evidence of loss by the party infringed,

(a) by an arbitrary and capricious finding of profit to the infringer which was arrived at by the fiction of eliminating the true cost of executive salaries from the expenses of doing business, and

(b) by the exclusion of losses sustained during the period of infringement in the computation of the total profits?

REASONS FOR GRANTING THE WRIT

The punishment does not fit the crime. This was a "de novo" decision. The judge who heard the witnesses died before rendering a decision, but not before indicating throughout the record that he accorded little weight to the so called "confusion" evidence admitted. The Judge who took over the case studied the 2426 page record for more than a year, and after listening to extensive oral arguments by counsel, decided all the facts and conclusions of law in favor of petitioner.

White cannot be *black*. It was necessary for the Court of Appeals to decide every inference of the case completely against petitioner, contrary to all the rules of equity and law in fraud cases. The overwhelming majority of instances of "confusion" was submitted by self-interested employees, agents and dealers of the plaintiff. In the retail customer category, plaintiff called but one witness for testimony in open court, and he was not an ordinary purchaser of

paint exhibiting the buying habits normally expected of him.

This is not a clear case of petitioner having knowledge of wrongdoing and yet proceeding wilfully to do wrong at his own peril. In the early spring of 1948, 16 months before receiving a notice of infringement from the plaintiff, petitioner consulted an experienced trademark attorney to determine his rights. He was unequivocally advised that he had full legal right to use the word "Dutch" and "Dutch Paint" in the promotion and sale of his products. Four years later a United States District Court Judge affirmed this advice. It is completely unreasonable, therefore, to punish petitioner for fraud for exercising rights which he and the District Court believed to be his own. Even if the Court of Appeals could infer intentional misleading it failed to distinguish between intent to deceive and the correct intention in this case, which was the intent of the petitioner to exercise what he believed (and Attorney Naylor and Judge Murphy believed) to be his absolute legal right.

Petitioner served his country on active duty as a Naval Officer for almost twelve years before and during World War II. He had an outstanding record, both morally and for his devotion to duty. On termination of his active duty Secretary of the Navy Forrestal wrote to him, "The Nation's gratitude will go with you into civilian life". Surely Petitioner does not ask for too much when he requests this Court to review a decision of the Court of Appeals characterizing his actions as "fraudulent" when that Court

never saw nor heard the petitioner, nor any other witness, and especially since this decision was a reversal of a finding that Petitioner's conduct was blameless.

This case was never presented nor tried on a theory of fraud and no defense was ever made to such a charge. The finding of fraudulent misrepresentation by the Court of Appeals was based solely on inferences which the Court read into a cold record. Had Plaintiff presented the case on the theory of fraud originally, petitioner would have requested a Jury to determine this critical fact. The case developed from a technical Declaratory Judgment action by Petitioner who sought advice from the Court as to his legal rights in a field uncertain to a layman. The purpose of this type of action is to minimize the damages which might accrue. Petitioner made every effort to shorten the litigation, including a motion for a Summary Judgment which was successfully opposed by plaintiff who took depositions all over the Eastern states, the Northwest, Far West, and Hawaii. Now, 11 years later, after being advised by the Federal District Court that he had the legal right which he believed to be his, petitioner is faced with an excessive fine and the cruel and unusual punishment of being branded a fraud without having been specifically tried for fraudulent action. He has been forced to give up his business and is ordered to pay a quarter of a million dollar judgment for profits never realized by him and for damages never inflicted upon the plaintiff. Neither equity nor reason can sustain such a judgment.

In *Nebbia v. New York,* 291 U.S. 502, this Court held "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained". The Court of Appeals directed an accounting of petitioner's profits pursuant to the rule of *Mishawaka Mfg. Co. v. Kresge Co.,* 316 U.S. 203, which held that "the plaintiff is not entitled to profits demonstrably not attributable to the unlawful use of his mark". Despite this holding the Court of Appeals "unreasonably, arbitrarily, and capriciously" refused to permit petitioner to demonstrate that profits computed excluding executive salaries for manufacturing and sales, were profits demonstrably not attributable to the unlawful use of Plaintiff's mark. Salaries sought to be included as legitimate business expenses were paid to the partners for performing the functions of plant superintendent, purchasing officer, credit manager, personnel manager, salesman and sales manager, advertising manager, and general executive officers of the business. The partners performed these functions and if they had not done so they would have had to pay someone else to do the work which they did. There is no question as to the reasonableness of the amounts claimed, $12,000 per year for each of two partners. The Court permitted this amount to be charged to expenses during the period that petitioner operated as a Corporation, but unreasonably refused to concede that the same amount should be deducted from the profits each year during the period that petitioner operated as a partnership. Yet the Court

had no trouble deciding that petitioner should be accountable for profits made by the corporation during the years 1946, 1947, and 1948 when the corporation, dissolved in 1948, should have been responsible. The exclusion of a real cost of doing business which must of necessity be borne by Plaintiff or any other manufacturer, constitutes a deprivation of property without due process of law, since these fictitious profits are "demonstrably not attributable to the unlawful use of plaintiff's mark".

Similar reasoning indicates the error of a holding that losses incurred from sales of Dutch Paints during the term of the accounting should not be deducted from profits. Petitioner is being held to account for the profits received from the use of the infringing mark for a ten year term. The division of the ten year term into annual accounting periods is done only for convenience in accounting. Whether a profit is considered to be made during a specific annual period depends entirely upon the accounting practice employed, the methods of depreciation or allocation of expenses used for the particular period. If for example, a large amount of advertising is done in one calendar year to induce sales the next year it is possible that there will be a resulting book loss the first year and a corresponding profit the next year when the advertising expense is curtailed. It is illogical to contend, as does the Plaintiff, that the profit should be counted but the loss omitted from consideration. "The plaintiff is not entitled to profits demonstrably not attributable to the unlawful use of his mark". If petitioner lost $20,000 this year selling Dutch Paint

under his accounting system but made a profit of $30,000 next year, the profits to which plaintiff is entitled are $10,000 since the balance is demonstrably not attributable to the unlawful use of his mark. Arbitrary exclusions of losses of this type constitute deprivation of property without due process of law.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for rehearing on denial of the writ of certiorari should be granted.

Dated, San Francisco, California,
May 10, 1960.

Respectfully submitted,
BERNARD M. WOLFE,
In Propria Persona.